APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20988

[Filed July 18, 2007]

HALEY KING,
Plaintiff-Appellant,

v.

CONROE INDEPENDENT SCHOOL DISTRICT; et al.
Defendants,

and

CONROE INDEPENDENT SCHOOL DISTRICT; DON STOCKTON,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before JONES, HIGGINBOTHAM and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-20988

[Filed May 29, 2007]

HALEY KING,
Plaintiff-Appellant,

v.

CONROE INDEPENDENT SCHOOL DISTRICT; et al.
Defendants,

and

CONROE INDEPENDENT SCHOOL DISTRICT; DON STOCKTON,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Houston
No. 4:03-CV-1295

Before JONES, Chief Judge, and HIGGINBOTHAM and CLEMENT, Circuit Judges.

OPINION

PER CURIAM:*

Haley King appeals the district court's grant of summary judgment to defendants Conroe Independent School District ("CISD") and Principal Don Stockton ("Stockton") on her claims arising out of sexual abuse committed against her by Felicia Shupp, a volleyball coach employed by CISD. Having carefully and independently reviewed the record, and having found no reversible error, we AFFIRM.

The summary judgment evidence reveals the following details. What began as a friendship between a coach and a student-athlete during the 1997-1998 school year, when King was an eighth-grade student at CISD's McCullough Junior High School, erupted into a physical relationship during the summer of 1998, and shortly thereafter evolved into a long period of frequent sexual contact.

In the fall of 1998, as the physical abuse was just beginning, Ruth Stayton, a parent of a McCullough student, overheard her son and his friend discussing an "affair" between a female coach and a female student, in which the student and coach were seen kissing and passing notes. She reported what she had heard to McCullough principal Don Stockton, but did not give her own name and could not identify the

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

student.[1] The conversation occurred in a busy hallway and lasted only a few minutes. Stockton stated he was unaware of any such relationship and did not think the report was true, but that he would speak with Shupp. Stockton and vice-principal Gale Drummond later met with Shupp. Shupp denied any inappropriate relationship, and Stockton and Drummond warned her to keep her relationships with students professional at all times. Curiously, Stockton claims not to remember the conversation with Stayton or the meeting with Shupp, although he does not deny they occurred.[2] No further action or investigation was taken by Stockton or other CISD officials.

The abuse finally ended in December 2001, almost three and a half years after it had begun. In January 2002, King reported Shupp to the police. Shupp pled guilty to sexual assault of a child and was sentenced to seven years deferred adjudication and forty-five days in the county jail.

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[1] Stayton's recollections differ as to whether she identified the coach. In her 2002 statement to police, Stayton claimed she told Stockton she "thought the name of the coach was Shupp." However, in her 2004 affidavit, she states it was Stockton who mentioned Shupp by name. Nonetheless, it is clear that Stockton knew to which coach Stayton was referring, as Shupp was the only coach with whom he subsequently met to discuss the alleged abuse.

[2] Stockton claims that he has no memory of the sexual abuse allegations. Stockton's memory deficiencies, however, are ultimately irrelevant to the legal analysis.

In April 2003, King sued CISD, Stockton, and Shupp, asserting violations of 42 U.S.C. § 1983 and Title IX, 20 U.S.C. § 1681, as well as state law claims of negligence and gross negligence. After dismissing the state law claims and severing the case against Shupp, the district court granted summary judgment to Stockton based on qualified immunity, and later granted summary judgment to CISD. The district court also denied King's motion to enlarge time to conduct additional discovery. King now appeals.

This court reviews the district court's grant of summary judgment *de novo*, applying the same legal standards as the district court. *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 403 (5th Cir. 2004). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The court must review the facts in the light most favorable to the nonmovant. *Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000).

King alleges that Stockton violated § 1983 because he was the principal of the school where Shupp worked and knew or was placed on notice of, but failed to stop, the sexual relationship. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 445 (5th Cir. 1994) (en banc). A supervisory school official can be held liable under § 1983 for an employee's sexual abuse of a student when:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate

> pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.

Id. at 454.

Assuming *arguendo* that Stayton's conversation provided Stockton with notice of the sexual abuse, King cannot establish that Stockton acted with deliberate indifference toward her constitutional rights. Stockton met with Shupp, questioned her about the alleged relationship, and, upon receiving a denial, warned her to keep her relationships with students professional at all times. Based on the limited information he had, such action satisfies the *Doe v. Taylor* standard. *See id.* at 456 n.12 ("We can foresee many good faith but ineffective responses that might satisfy a school official's obligation in these situations, *e.g.*, warning the state actor, notifying the student's parents, or removing the student from the teacher's class.").

Although his actions did not prevent the subsequent abuse and suffering, "[a]ctions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate

indifference and thus do not divest the official of qualified immunity." *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 219 (5th Cir. 1998). Additionally, while King contends that Stockton failed to follow CISD policies to investigate the abuse, such a failure does not give rise to liability unless the plaintiff can first prove "that all of the procedures...were obviously necessary." *Hagan v. Houston Indep. Sch. Dist.*, 51 F.3d 48, 53 (5th Cir. 1995). In light of the limited information Stayton gave Stockton, further action was not "obviously necessary."

The test for this court to apply is not whether Stockton did all he could, or should, have done, but whether he acted with deliberate indifference to King's constitutional rights. Because there is no genuine issue of material fact concerning whether Stockton acted with deliberate indifference, he is entitled to qualified immunity on King's § 1983 claim.

CISD is similarly entitled to summary judgment on King's Title IX, 20 U.S.C. § 1681, claim,[3] as she is

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[3] Recovery of damages from a school district for a teacher's sexual harassment of a student requires proof that (1) a school district employee with supervisory power over the offending teacher (2) had actual notice of the harassment and (3) responded with deliberate indifference. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 1999, 141 L. Ed. 2d 277 (1998). To qualify as a supervisory employee, the school official must serve in a position "with the authority to repudiate that conduct *and* eliminate the hostile environment." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 661 (5th Cir. 1997)(internal quotation marks omitted)(emphasis in original). This test omits "the bulk of

unable to raise a fact issue that any CISD employee with supervisory authority over Shupp knew about the sexual abuse and failed to stop it.[4]

Finally, King moved for a continuance before the district court to enable her to conduct additional discovery on the knowledge and authority of five individuals she claimed could impute liability to CISD. We review this ruling for abuse of discretion. *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 304 (5th Cir. 2004). In requesting more time, King failed to show how further discovery would create a genuine issue of material fact, and instead "simply rel[ied] on vague

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employees, such as fellow teachers, coaches, and janitors." *Id.* at 660.

[4] Stockton did not act with deliberate indifference based on the limited information he received. King has not proven that the other CISD individuals she identified had both knowledge of the abuse and the necessary supervisory authority over Shupp. *See Gebser*, 524 U.S. at 290, 118 S. Ct. at 1999. Vice-principal Gale Drummond had similar information to Stockton and took similar action; she was therefore not deliberately indifferent. Athletic directors Karen Heintz and William Willig had neither supervisory authority over Shupp, nor actual knowledge of the abuse. Although Ginger Leflar, Shupp's mother, witnessed the abuse and therefore clearly had knowledge of it, as a fellow teacher, she is not a supervisory official whose conduct can be imputed to CISD. *See Rosa H.*, 106 F.3d at 660-61. Finally, King cannot show that the unidentified office employee with whom Stayton spoke before her discussion with Stockton had any sort of supervisory authority over Shupp. *See id.*

assertions that additional discovery will produce needed, but unspecified, facts." *Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 606 (5th Cir. 2001)(internal quotation marks omitted). The district court did not abuse its discretion. The events leading up to this suit are tragic. In hindsight, many people could have acted to prevent Haley King's abuse. However, based on the precedent in this circuit, King is not able to create material fact issues suggesting that the CISD officials' ineffective, and perhaps negligent, actions amounted to deliberate indifference of her statutory or constitutional rights. The judgment of the district court granting summary judgment to CISD and Stockton is therefore **AFFIRMED.**

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20988

[Filed June 22, 2007]

HALEY KING,
Plaintiff-Appellant,

v.

CONROE INDEPENDENT SCHOOL DISTRICT; et al.
Defendants,

and

CONROE INDEPENDENT SCHOOL DISTRICT; DON STOCKTON,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas, Houston

D.C. Docket No. 4:03-CV-1295

Before JONES, Chief Judge, and HIGGINBOTHAM and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JUN 20 2007

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: /s/ _____
Deputy

New Orleans, Louisiana JUN 20 2007

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. H-03-1295

[Filed October 18, 2005]

HALEY KING, Plaintiff,	)
v.	)
CONROE INDEPENDENT SCHOOL DISTRICT, DON STOCKTON, Individually, and FELICIA SHUPP, Individually, Defendant.	)

ORDER AND FINAL JUDGMENT

Defendants Conroe Independent School District and Don Stockton have filed a Motion to Sever and Enter Final Judgment. No response has been filed. This court finds that there is no just reason to delay the entry of final judgment as to CISD and Stockton. It is ordered that defendants Conroe Independent School District and Don Stockton are severed from this lawsuit. All of plaintiff's claims against defendants Conroe Independent School District and Don Stockton

are dismissed, with prejudice. CISD and Don Stockton are entitled to recover their reasonable costs from plaintiff under Federal Rule of Civil Procedure 54(d); each party will bear its own attorney's fees. This is a final judgment as to CISD and Don Stockton.

Plaintiff must file a status report with respect to her claims against defendant Felicia Shupp no later than **October 28, 2005**.

SIGNED on October 28, 2005, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

No. H-03-1295

[Filed July 15, 2005]

HALEY KING, Plaintiff,

v.

CONROE INDEPENDENT SCHOOL DISTRICT, DON STOCKTON, Individually, and FELICIA SHUPP, Individually, Defendant.

MEMORANDUM AND ORDER

Plaintiff, Haley King, sued the Conroe Independent School District ("CISD"); a former CISD coach, Felicia Shupp; and a former CISD principal, Don Stockton. King alleged that when she was a fourteen year-old eighth-grade student, Shupp, a coach of the girls' volleyball team at the junior high school King attended, engaged her in a sexual relationship that continued for three years. King alleges that CISD violated Title IX, 20 U.S.C. § 1681, because school

district employees with supervisory authority over Shupp knew of the sexual relationship and failed to end it. (Docket Entry No. 46). In September 2004, this court dismissed King's claim against Stockton, asserted under 42 U.S.C. § 1983, based on qualified immunity.[1] CISD then moved for summary judgment, arguing that the asserted Title IX claim fails, as a matter of law, because the undisputed evidence shows that Stockton was the CISD employee who exercised supervisory authority over Shupp and this court found that Stockton did not have actual knowledge of the sexual relationship and did not respond with deliberate indifference, precluding liability as a matter of law. (Docket Entry Nos. 39, 50). King responds by arguing that there are triable issues of fact as to CISD's liability based on the knowledge and response of five school district employees other than Stockton who potentially had supervisory authority over Shupp. King alternatively seeks an extension of time under Rule 56(f) to conduct additional discovery to determine the knowledge of these individuals and whether they had the authority over Shupp necessary to impose liability on CISD for their failure to stop the abuse. (Docket Entry No. 46).

Based on the pleadings; the motions, responses, replies; the summary judgment record; and the applicable law, this court denies King's motion for an extension of time and grants CISD's motion for summary judgment. Counsel for defendants is to

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[1] This court found that Stockton was entitled to qualified immunity *under Doe v. Taylor*, 15 F.3d 443 (5th Cir. 1994). (Docket Entry No. 37).

submit a statement identifying any remaining issues or a proposed form of final judgment, no later than August 12, 2005. The reasons for these rulings are set out below.

I. Background

The background facts, set out in full in this court's earlier summary judgment opinion, are only summarized here. In the 1997-1998 school year, King was a student at CISD's McCullough Junior High School. Stockton was the school principal and Gale Drummond was the assistant principal. King played on the school volleyball team; Felicia Shupp was King's volleyball coach. Shupp was married and lived with her husband William Shupp, who coached at another CISD school. (Docket Entry No. 32, Ex. G). Shupp's mother, Ginger Leflar, was a teacher at another CISD middle school. (Docket Entry 32, Ex. A, H-10). After the 1997-1998 school year ended, Shupp's relationship with King progressed and eventually led to frequent sexual encounters, all outside school.

In the fall of 1998, Ruth Stayton, the parent of another McCullough Junior High student, told Stockton that she had heard from her son and his friend that a female coach and a female student were having an "affair" and that the son's friend had stated that she had seen the coach and the student kissing. Stockton stated that he was unaware of any such inappropriate relationship and that he would speak with Shupp. Stockton summoned Shupp to a meeting that Gale Drummond, the assistant principal, attended. Drummond and Stockton asked Shupp if she was having an inappropriate relationship with a

student; Shupp denied any impropriety. Stockton and Drummond warned her to keep her relationships with students professional at all times. (Docket Entry No. 27, Ex. B). The relationship, however, persisted after King began attending The Woodlands High School.

During the 1999-2000 school year, King was a tenth-grade student at The Woodlands High School. Shupp continued to coach at McCullough Junior High School. Stockton had left his position at McCullough Junior High and had become principal of The Woodlands High School. (Docket Entry No. 32, Ex. A, p.2). In 2000, Shupp applied for the position of girls' junior varsity volleyball coach at The Woodlands High School. Teresa Hinojosa, the girls' varsity coach at The Woodlands High School, recommended Shupp for the position. Hinojosa relayed her recommendation to Weldon Willig, an athletic director at The Woodlands High School. Willig arranged for Shupp to interview with him and Karen Heintz, another athletic director at the school. Shupp was not hired for the coaching position. (Docket Entry No. 32, Ex. D). Shupp later applied for a position as an English teacher at The Woodlands High School, but was unsuccessful. Shupp resigned from McCullough Junior High in the summer of 2000. Later that fall, Shupp accepted a position at a CISD middle school, teaching English.

The sexual relationship between King and Shupp continued through 2001. King reported Shupp's behavior in January 2002. Shupp pleaded guilty to sexual assault of a child. (Docket Entry No. 32, Ex. I). King filed this lawsuit in April 2003 against CISD, Stockton, and Shupp. In her first amended complaint, King asserted causes of action against Stockton under

42 U.S.C. § 1983. (Docket Entry No. 9). After discovery targeted to the qualified immunity defense, Stockton moved for summary judgment. This court dismissed the claim against Stockton on the basis that undisputed facts in the record showed that Stockton did not have sufficient knowledge of the sexual relationship to make his failure to take further action deliberate indifference to King's constitutional rights.

CISD then moved for summary judgment, arguing that this court's determination that Stockton was entitled to qualified immunity effectively disposes of King's Title IX claim against the school district. CISD argues that because Stockton was the CISD official who exercised supervisory authority over Shupp, she cannot make the showing necessary to impose liability on CISD under Title IX. (Docket Entry No. 39). King argues that "neither statute nor case law expressly states or even suggests that a principal is the only employee of a school district which may trigger the school district's liability under Title IX." (Docket Entry No. 46, p. 15). King asserts that there are triable issues of fact as to whether five school district employees had the requisite authority over Shupp and knowledge to trigger CISD's liability. King identifies Ginger Leflar, a CISD teacher at another CISD middle school and Felicia Shupp's mother; an unidentified CISD employee who worked at the office at McCullough Junior High and spoke to Ruth Stayton; Gail Drummond, the McCullough Junior High assistant principal who attended the 1998 meeting with Shupp and Stockton; and Weldon Willig and Karen Heintz, the athletic directors at The Woodlands High School who interviewed Shupp when she applied for the junior varsity coaching position in 2000.

CISD argues that King has failed to raise a disputed fact issue material to determining whether an appropriate CISD official had actual knowledge of the sexual relationship and failed to take appropriate action to end it. Each argument and response is examined below.

II. The Applicable Legal Standards

A. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56. Under FED. R. CIV. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Stahl v. Novartis Pharmaceuticals Corp.*, 283 F.3d 254, 263 (5th Cir. 2002). If the burden of proof at trial lies with the nonmoving party, the movant may either (1) submit evidentiary documents that negate the existence of some material element of the opponent's claim or defense, or (2) if the crucial issue is one on which the opponent will bear the ultimate burden of proof at trial, demonstrate the evidence in the record insufficiently supports an essential element or claim. *Celotex*, 477 U.S. at 330. The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir.

2005). "An issue is material if its resolution could affect the outcome of the action." *Weeks Marine, Inc. v. Fireman's Fund Ins. Co.*, 340 F.3d 233, 235 (5th Cir.2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Baton Rouge Oil & Chemical Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 375 (5th Cir. 2002).

When the moving party has met its Rule 56(c) burden, the nonmoving cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. The nonmovant must identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim. *Johnson v. Deep E. Texas Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 305 (5th Cir.2004). The nonmovant must do more than show that there is some metaphysical doubt as to the material facts. *Armstrong v. Am. Home Shield Corp.*, 333 F.3d 566, 568 (5th Cir.2003).

Affidavits supporting or opposing summary judgment must "set forth facts that would be admissible in evidence." FED.R.CIV.P. 56(e); *see Love v. Nat'l Med. Ctr.*, 230 F.3d 765, 776 (5th Cir. 2000). "Statements constituting hearsay are not competent summary judgment evidence." *Okoye v. Univ. of Tex. Houston Health Science Ctr.*, 245 F.3d 507, 510 (5th Cir. 2001) (citing *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995)). Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of

material fact if offered at trial. *See Pegram v. Honeywell, Inc.*, 361 F.3d 272, 285 (5th Cir. 2004).

In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721, 725 (5th Cir. 2002); *Anderson*, 477 U.S. at 255. "Rule 56 *mandates* the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(quoting *Celotex*, 477 U.S. at 322).

B. The Title IX Standard

Title IX provides in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). As a recipient of federal funds, a school district may be liable for damages under Title IX. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998); *see Doe v. Lago Vista Indep. Sch. Dist.*, 106 F.3d 1223, 1225 (5th Cir. 1997). "Sexual harassment of a student by a teacher constitutes actionable discrimination for the purposes of Title IX." *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60,75, 112 S. Ct. 1028, 117 L. Ed.

2d 208 (1992); *see also Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 653) (5th Cir. 1997) (holding that "minor students who have been subjected to a sexual relationship with their teachers have a private cause of action for monetary damages" under Title IX).

A Title IX plaintiff cannot recover damages "against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice." *Gebser*, 524 U.S. at 285; *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). To recover damages for a teacher's sexual harassment of a student requires a showing that: (1) a school district employee with supervisory power over the offending teacher; (2) had actual knowledge of the harassment; and (3) responded with deliberate indifference. *Gebser*, 524 U.S. at 290. "To qualify as a supervisory employee whose knowledge of abusive conduct counts as the district's knowledge, a school official must at least serve in a position with the authority to repudiate that conduct *and* eliminate the hostile environment' on behalf of the school district." *Rosa H.*, 106 F.3d at 661 (quoting *Nash v. Electrospace System, Inc.*, 9 F.3d 401, 404 (5th Cir. 1993)). Notice of teacher-student harassment to employees who have no authority beyond reporting the misconduct to other school district employees is insufficient to expose a school district to Title IX liability. *Id.*

"The plaintiff in a Title IX damages suit based on a teacher's behavior must prove actual knowledge of misconduct . . . and must also prove that the officials having that knowledge decided not to act on it." *Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2001).

The "actual knowledge" requirement is based on the subjective standard that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Rosa H.*, 106 F.3d at 658 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). An official decision by the school district not to remedy the violation requires that the supervisory employee's response "amount to deliberate indifference to discrimination." *Gebser*, 524 U.S. at 290; *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (defining Title IX deliberate indifference standard for student-to-student harassment as when the "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances"). School officials may avoid liability under a deliberate indifference standard by responding reasonably to a risk of harm, even if the response is unsuccessful. *See Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000), *cert. denied*, 531 U.S. 1073, 121 S. Ct. 766, 148 L. Ed. 2d 667 (2001). What constitutes appropriate remedial action for allegations of discrimination in Title IX cases depends on the particular facts of each case. *Id.* (citations omitted).

III. School Officials with Authority and Knowledge

The parties dispute the effect of this court's determination that Stockton, the principal at McCullough Junior High from 1997 to 1999 and The Woodlands High School in 2000, was entitled to qualified immunity. CISD argues that Title IX actions

fail as a matter of law when the appropriate supervisor did not commit the underlying constitutional violation by acting with deliberate indifference to known sexual harassment of a student. (Docket Entry No. 39). King responds that there are fact issues as to whether five other CISD employees had supervisory power over Shupp, knew about the sexual relationship, and responded with deliberate indifference.

This court cannot conclude that Stockton's qualified immunity, as a matter of law, entitles CISD to summary judgment. The case law does not limit the employee who may trigger a school district's liability under Title IX to the principal. School districts are liable if "an *employee* who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." *Gebser*, 524 U.S. at 280 (emphasis added). "School districts contain a number of layers below the school board: superintendents, principals, vice-principals, and teachers and coaches, not to mention specialized counselors such as Title IX coordinators. Different school districts may assign different duties to these positions or even reject the traditional hierarchical structure altogether." *Rosa H.*, 106 F.3d at 660. Because officials' roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. The issue is whether the summary judgment record creates a genuine issue of disputed fact material to determining whether a CISD employee with supervisory authority to end the abuse or to institute corrective measures on CISD's behalf had actual notice of the sexual relationship and responded

with deliberate indifference. *See Dallas Indep. Sch. Dist.*, 220 F.3d at 384; *Gebser*, 524 U.S. at 280. If the record does not raise such an issue, the issue is whether King is entitled to a continuance under Rule 56(f) to conduct further discovery before the motion is decided.

A. The CISD Teacher

Ginger Leflar, who is Felicia Shupp's mother, teaches at a CISD middle school. King argues that because Texas law and CISD policy impose a duty to report child abuse on teachers, *see* TEX. FAM. CODE. ANN. § 261.101(a), a teacher such as Leflar can be a supervisory official who can trigger CISD's liability under Title IX.

The case law precludes King's argument. In *Rosa H.*, the Fifth Circuit held that a school district's liability under Title IX for teacher-student sexual harassment requires a showing that a school district employee invested by the school board with the duty to supervise the teacher and the power to take action that would end such abuse actually knew of the abuse and failed to end it. As the court explained, merely having the duty to report suspected abuse does not make a teacher or school employee one with the kind of supervisory authority that can expose a school district to liability under Title IX:

> [The Title IX] inquiry circumscribes those employees in the chain of command whom the school board has appointed to monitor the conduct of other employees and, *as distinguished from reporting to others*, remedy

> the wrongdoing themselves. [This standard ensures] the board's liability and practical control are sufficiently close to reflect its intentional discrimination. *It does so by omitting the bulk of employees, such as fellow teachers, coaches, and janitors, unless the district assigned them both the duty to supervise the employee who has sexually abused a student and also the power to halt the abuse.*

Rosa H., 106 F.3d at 660 (emphasis added). The Supreme Court affirmed this standard in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. at 280. King's reliance on the obligation of CISD employees and teachers to report suspected sexual harassment of students does not raise a fact issue as to CISD's liability under Title IX based on Ginger Leflar's actions or inactions with respect to Shupp's relationship to King.

The undisputed facts in the record show that Leflar was a teacher at another CISD middle school, with no official supervisory power over Shupp. Although the record does contain evidence that Leflar saw King and Shupp together in intimate circumstances in the winter of 1999,[2] a school district official's knowledge of

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[2] King states that in the winter of 1999, she was with Shupp at the home of Shupp's parents. Leflar walked into a bedroom where King and Shupp were engaging in sexual acts. King describes a later conversation between Felicia and Leflar as follows: "Felicia confronted her mom, and from what Felicia told me, her mom told her that she was playing with fire and she was going to get burned. She told Felicia that she needed to stay away from me

a sexual relationship is insufficient to raise a fact issue as to the school district's liability; evidence that the official also had a duty to supervise the harassing teacher is also required. A school district is not liable under Title IX for a teacher's harassment of a student if the official with actual knowledge of the abuse is another teacher, to whom the school board has given no supervisory authority over the harasser. *Canutillo Independent School District v. Leija*, 101 F.3d 393, 401 (5th Cir. 1996)(to trigger liability the official must have "authority over employees, including, perhaps, the power to hire, fire, or discipline"). The undisputed facts in the record show that as a matter of law, Leflar is not a supervisory official whose knowledge of Shupp's abuse of King could lead to CISD's liability.

B. The Unidentified School Official

King asserts that the unidentified employee in the McCullough Junior High School office might have both knowledge of the abuse and authority to address it, which could raise a disputed fact issue material to CISD's liability under Title IX. The record shows that before Stayton relayed what she had heard from her son's friend to Stockton, she relayed the story to an unidentified office employee and asked who was the best person to tell. The unidentified office employee told Stayton to talk to Stockton.

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because if that got out her life would be ruined." (Docket Entry 27, Ex. A-1, p.3).

The relevant portion of Stayton's deposition states:

> A: Shortly after first hearing the disturbing conversation between my son and his friend, but prior to the morning I spoke to Dr. Stockton, I went to the school office. I mentioned what I'd heard to another person in that school office. I was concerned about the matter and asked this person what I should do. That person said, if there was someone to tell, it was Dr. Stockton. . . . I believe the conversation I had with the person was over the telephone. In fact, I know that it was.

(Docket Entry No. 36, Ex. A, p. 106). Stayton's testimony does not suggest that this office employee had any supervisory authority to act on an allegation of teacher misconduct. To the contrary, her testimony is that the employee referred Stayton to Stockton and identified him as the person with the responsibility and authority to respond to the situation. Moreover, the record evidence is that Stayton relayed the same information to the employee that she later relayed to Stockton. This court has already concluded that Stayton's reported concerns did not raise a fact issue that Stockton had actual knowledge of a sexual relationship between King and Shupp.

There is no evidence in the record to raise a fact issue as to whether the office employee had supervisory authority over Shupp or had actual knowledge of Shupp's abuse. *See Doe v. Dallas I.S.D.*, 153 F.3d 211, 218, n. 7 (5th Cir. 1998) ("Testimony based on conjecture or speculation is insufficient to

raise an issue of fact to defeat a summary judgment motion. . . .") (quoting *Ruiz v. Whirlpool*, 12 F.3d 510, 513 (5th Cir. 1994)). The CISD office employee does not, as a matter of law, qualify as a school official whose authority and knowledge could expose CISD to Title IX liability.

C. The Woodland High School Athletic Directors

King asserts that William Willig and Karen Heintz, two athletic directors at The Woodlands High School, had supervisory authority over Shupp and that there are genuine issues of disputed fact material to determining whether they had actual knowledge of the sexual relationship and responded adequately. King relies on much of the same evidence that this court previously found insufficient to raise a fact issue as to whether Stockton knew of the sexual abuse, Hinojosa's affidavit that describes Willig's initial enthusiasm for Shupp and Heintz's change in behavior toward King after the decision not to hire Shupp. *See Dallas Indep. Sch. Dist.*, 220 F.3d at 382 ("Given the factual development that took place . . . with respect to the § 1983 claims against DISD and [the principal], we can say that if Plaintiffs can produce no additional evidence, Defendants will be entitled to summary judgment on the Title IX claim.").

In 2000, while Shupp was teaching at McCullough Junior High School, she applied for the junior varsity coaching position at The Woodlands High School. Stockton was the principal and Willig and Heintz were the athletic directors. King previously argued that Stockton exercised a de facto veto over Shupp's

application for junior varsity girls' volleyball coach and later refused to hire her for an English teaching position. King relied on a statement in Stockton's affidavit that a CISD principal is involved in every hire at his or her school, as well as the affidavit of Teresa Hinojosa, the varsity coach at The Woodlands High School. (Docket Entry No. 32, Ex. F, 49-50).[3] In her affidavit, Hinojosa stated that Willig initially supported her recommendation that Shupp be hired for the junior varsity position. After talking to Shupp, Willig told Hinojosa that Shupp would not be hired. Hinojosa stated that: "in reflecting on the matter now, given the allegations that have been made, I believe that when Don Stockton got involved with the interview process, something happened." (Docket Entry No. 32, Ex. D). This court concluded that the decisions made by Stockton and the athletic directors that Shupp would not be hired at The Woodlands High School in 2000 did not raise a fact issue that Stockton knew of the sexual relationship between King and Shupp.

In response to CISD's motion for summary judgment, King submitted a second affidavit from Teresa Hinojosa dated December 23, 2004. The December 2004 affidavit is almost identical to the first affidavit, with the addition of the following statements:

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[3] This court has already concluded the statement in William Shupp's affidavit, in which he stated that Shupp told him that Willig and Heintz told Shupp they did not think it would be a good idea for Shupp to work at the same campus where King attended school, is inadmissible hearsay. (Docket Entry 37, pp. 17-19).

> I can additionally testify that Weldon Willig and Karen Heintz could do just about what they wanted in their positions as Men's and Women's Athletic Directors, and generally had a free hand with athletics at The Woodlands High School, including decisions and assignments of personnel, (coaches).
>
> Weldon Willig and Karen Heintz, as athletic directors and school district officials, would have had the authority to institute corrective measures on the district's behalf. Certainly, as athletic directors, they would have supervisory powers over their coaches, of which, as a Freshman Coach for The Woodlands High School, Felicia was one.

(Docket Entry No. 46, Ex. A). CISD objects to Hinojosa's statements about the athletic directors' supervisory authority over Shupp and argues that King has failed to present competent summary judgment evidence that the school district charged Willig and or Heintz with authority to address teacher-student sexual harassment.

The copy of the CISD policy in the record sets forth the school district's Title IX compliance procedure. The CISD policy does not identify athletic directors as employees with supervisory authority or responsibility for responding to teacher-student sexual harassment. The CISD policy states in relevant part:

> Any District employee who receives information about sexual harassment or sexual abuse of a student that may reasonably be characterized

> as known or suspected child abuse or neglect shall make the reports to appropriate authorities, as required by law. . . . An employee who suspects or knows that a student is being sexually harassed or sexually abused by a school employee or by another student shall inform his or her principal, immediate supervisor, or the Title IX coordinator.

(Docket Entry No. 39, Ex. E-2). The CISD policy defines the Title IX coordinator as "a District employee who has responsibility to assure District compliance with the requirements of Title IX. The coordinator will investigate or oversee an investigation of a complaint alleging violations of Title IX." (Docket Entry No. 39, Ex. E-2). King does not suggest, and the record does not support an inference, that the athletic directors at the high school were "Title IX coordinators." In other sections, the policy refers to the principal and the Title IX coordinator as the two employees responsible for investigating and resolving sexual harassment complaints. King's previous position that the school district vested the principal with the supervisory authority to remedy sexual harassment is consistent with the CISD policy.

The record is unclear as to whether the athletic directors at the high school were Shupp's "immediate supervisors." Shupp was a coach at the junior high school. Although some junior high school girls played on high school teams, Hinojosa's statement about Willig and Heintz appears to be that if Shupp had been hired for the position at The Woodlands High School, Willig and Heintz would have had supervisory

authority over her.[4] Shupp was not hired to fill the high school position; she remained on the staff of the junior high school. King argues that the record reveals that Willig and Heintz "caused her to be demoted to a Junior High position." (Docket Entry No. 46). The record does not support King's argument that Willig and Heintz "demoted" Shupp. In the summer of 2000, Shupp resigned from her coaching position at McCullough Junior High. Her resignation letter lists "staying home with son" as the reason. Shupp later accepted a position at CISD's Branch Crossing Middle

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[4] Although an athletic director may supervise coaching activities and have responsibility for coaching assignments, the record evidence shows that the school principal is responsible for teacher misconduct involving a student. King deposed Gregory Poole, a CISD principal and former athletic director at a middle school, and questioned Poole about an athletic director's supervisory authority over coaches. The deposition transcript states in part as follows:

> Q: So, is it fair to say, that you would have been over [William Shupp] for two years, the last two years of your athletic directorship?
>
> A: Yes. It's fair to say, as athletic director. Certainly the principal is more his administrator -- but supervisor, but I was over him in the capacity of coaching.

(Docket Entry No. 32, Ex. G, p. 25, 11. 5-10). Poole's testimony is consistent with the other evidence in the record that identifies the school principal as having the ultimate authority to respond to and remedy teacher-student sexual harassment.

School teaching seventh-grade English. (Docket Entry No. 32, Ex. H-10).

The statement in Hinojosa's affidavit that "both Weldon Willig and Karen Heintz, as athletic directors and school district officials, would have had the authority to institute corrective measures on the district's behalf," is conclusory and, on its face, speculative. It is not competent summary judgment evidence and, even if considered, does not create a triable issue of fact as to the athletic directors' supervisory authority. *See Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997)("Unsupported allegations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment."); FED.R.CIV.P. 56(c)("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

Even if King had raised a fact issue as to whether Willig and Heintz had supervisory authority over Shupp, King has failed to present evidence raising a fact issue that Willig and Heintz had actual knowledge of the sexual relationship. Hinojosa attributed that knowledge to Stockton in her first affidavit. King suggests that Stockton told Heintz and Willig, which led to their decision not to hire Shupp. This court has already found that the evidence as to Stockton failed to raise a fact issue as to whether he actually knew of the relationship between Shupp and King. There is nothing in the record to suggest that Willig and Heintz

had knowledge of the sexual abuse other than what Stockton may have told them. Moreover, the summary judgment evidence shows that there are other explanations for Shupp's failure to receive the high school coaching position she sought. Shupp had experienced unfavorable encounters with Heintz long before applying for the high school position in 2000.[5] The evidence as to the decision not to hire Shupp for the junior varsity coaching position does not raise a fact issue as to CISD's liability under Title IX.

D. The McCullough Junior High Assistant Principal

This court assumes without deciding that as an assistant principal, Drummond was an official with the power to remedy discrimination on behalf of CISD. The record, however, does not raise a fact issue as to whether she had actual notice of the abuse and acted with deliberate indifference in failing to take effective action to stop it. *See Dallas Indep. Sch. Dist.*, 220 F.3d at 384. The record does not provide a basis for concluding that Drummond had more knowledge about

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[5] The record contains an August 31, 1998 memo written by Shupp listing "incidents" she had with Heintz. Shupp stated that she felt Heintz had behaved "very unprofessional" and that she did not understand Heintz's behavior toward her. Shupp stated: "It has come to a point where I feel that documentation is necessary for my benefit. . . . I work hard and I am striving to move up, but me efforts are obviously not going to effect my status under Coach Heintz. . . . Right now there seems to be many hindrances that are getting in the way of my advancement." (Docket Entry No. 32, Ex. H-10; Docket Entry No. 37, p. 31.

the sexual relationship than Stockton or should have taken steps beyond the 1998 meeting Drummond and Stockton had with Shupp.

Drummond told the Montgomery County investigators that she had not heard any rumors about Shupp and any student. (Docket Entry No. 32, Ex H-9, p. 8). As this court previously noted, the police investigation and evidence submitted by the parties did not indicate that rumors of an inappropriate relationship between King and Shupp circulated among the faculty. Jane Allen, a teacher at McCullough, also specifically told the Montgomery County investigators that she had not heard any rumors about Shupp and any student. (Docket Entry No. 32, Ex H-9, p.8).

Stockton and Drummond met with Shupp during the 1998-1999 school year and asked her if she was having an inappropriate relationship with a student and warned her to keep her relationships with students professional at all times. (Docket Entry No. 27, Ex. B). Meeting with the allegedly offending employee to confront and warn the employee does not show deliberate difference. *See Dallas Indep. Sch. Dist.*, 220 F.3d at 387-88 (noting that warning the teacher identified may preclude liability even though the warning was ineffective). Because the undisputed facts in the summary judgment record show that Drummond no more knowledge of the sexual abuse than Stockton, King has failed to raise a fact issue as to CISD's liability under Title IX based on Drummond's knowledge and response.

IV. The Motion to Enlarge Time

King argues that because discovery was limited to Don Stockton's knowledge, she is entitled to additional time to conduct discovery on the knowledge and authority of the five employees identified in her response. (Docket Entry No. 46, p. 6). King has failed to make any showing that the additional discovery she seeks is likely to create a genuine issue of material fact. *See Beattie v. Madison County Sch. Dist.*, 254 F.3d 595, 606 (5th Cir. 2001) (a nonmovant seeking relief under Rule 56(f) "must show (1) why she needs additional discovery and (2) how that discovery will create a genuine issue of material fact"); *Karaha Bodas Co. v. Perusahaan Pertambangan MinyakDan Gas Bumi Negara*, 364 F.3d 274, 305 (5th Cir. 2004) (the nonmovant cannot "simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts").

The discovery that King conducted into the information available to Stockton and the responsive actions he took was limited, but provided significant information about the information generally available within the schools King attended. In addition, the discovery explored the school board policy regarding the officials who are charged as supervisory officials under Title IX. The summary judgment record contains the file created during the Montgomery County Sheriff's Department investigation of Shupp in 2002, after King reported their sexual relationship. The file contains statements from Ruth Stayton; Jane Allen, a McCullough Junior High School teacher; Gail Drummond; Don Stockton; and Felicia Shupp. The record also contains affidavits from William Shupp

and Teresa Hinojosa, and excerpts from the depositions of Stockton, Stayton, and Gregory Poole. In short, King has conducted significant discovery. She has failed to meet the burden necessary to obtain a continuance for further discovery under Rule 56(f). The undisputed facts in the summary judgment record reveal that, as a matter of law, none of the five individuals King identifies could qualify as supervisory officials with actual knowledge of the abuse who could trigger CISD's liability under Title IX. King's motion to enlarge time is denied.

V. Conclusion

CISD's motion for summary judgment is granted. Counsel for defendants is to submit a statement identifying any remaining issues or a proposed form of final judgment, no later than August 12, 2005.

SIGNED on July 15, 2005, at Houston, Texas.

Lee H. Rosenthal

United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

No. H-03-1295

[Filed September 8, 2004]

HALEY KING, Plaintiff,	)
v.	)
CONROE INDEPENDENT SCHOOL DISTRICT, DON STOCKTON, Individually, and FELICIA SHUPP, Individually, Defendants.	)

MEMORANDUM AND OPINION

Plaintiff, Haley King, has sued the Conroe Independent School District ("CISD"); a former CISD coach, Felicia Shupp; and a former CISD principal, Don Stockton. King alleges that beginning in 1997, when she was a 14-year old student, and continuing over the next three years, Shupp engaged her in a progressively more intimate relationship, ending in sexual encounters. King alleges that Stockton is liable under 42 U.S.C. § 1983 because he was the principal of

the school where Shupp worked and failed to prevent or stop the improper sexual relationship. Stockton has asserted the defense of qualified immunity and moves for summary judgment. (Docket Entry No. 27).

Based on the pleadings; the motions, responses, and replies; the summary judgment record; and the applicable law, this court grants Stockton's motion for summary judgment. The reasons for this ruling is set out below.

I. Background

A. The Summary Judgment Record

The Montgomery County Sheriff's Department conducted an investigation of Shupp in 2002 after King reported their sexual relationship. A large portion of the record consists of the file created during this investigation. Joe Sclider, the detective who received King's complaint and conducted the investigation, submitted an affidavit and a sworn copy of the statements he received during the investigation and his narrative of the investigation. King's statement, the longest in the Sclider file, gives a detailed description of the progression of her relationship with Shupp. Other statements are from Jane Allen, a McCullough Junior High School teacher; Gale Drummond, the vice-principal at McCullough Junior High; Felicia Shupp; and Don Stockton. Allen, Drummond, and Stockton all told Sclider that they had no knowledge of any inappropriate relationship between Shupp and any student. Shupp's statement described her relationship with King. A McCullough student submitted a statement in which she described

finding a note from Shupp to King, hearing rumors about the two, and asking Shupp about her relationship with King. The student also stated that she had seen Shupp and King in various public places together. Ruth Stayton, a parent of a McCullough student, submitted a statement describing a conversation she had with Stockton in 1998 about a rumor she heard from her son involving a girls' volleyball coach and a female student at McCullough Junior High School.

The summary judgment record also contains excerpts from the depositions of Stockton, Stayton, and Gregory Poole, a CISD athletic director at the school where William Shupp, the former husband of Felicia Shupp, was a soccer coach. Stockton and Stayton also submitted affidavits. Neither Shupp nor King was deposed, but both submitted affidavits. King also submitted affidavits from her mother, Sandra King; William Shupp; and Teresa Hinajosa, a volleyball coach at The Woodlands High School. King also submitted copies of the CISD written policies on sexual harassment, miscellaneous documents from Shupp's employment record, and two notes Shupp sent to King wishing her good luck in volleyball games.

B. The Evidence Relevant to Stockton's Qualified Immunity Defense

In the 1997-1998 school year, King was an eighth-grade student at CISD's McCullough Junior High School. Stockton was the school principal. King played on the school volleyball team; Felicia Shupp was King's volleyball coach. Over the course of King's eighth-grade year, she and Shupp became friends.

King asserts that Shupp told her and her parents that she was hanging out with the wrong crowd. (Docket Entry No. 27, Ex. A-1, p.1). King began to spend less time with her peers because of Shupp's comments. At the request of King's parents, King stayed with Shupp for several nights in the fall of 1997. Shupp was married at the time and lived with her husband, but King and Shupp stayed at the home of Shupp's parents, who were out of town. *(Id).* On one such occasion, Shupp got into bed with King for a few hours. (Docket Entry No. 32, Ex. A, p.2).

On the last day of the fall 1997 semester, Shupp gave King a letter and a charm with hearts on it. In the letter, Shupp told King that she would miss her over the break. During the spring 1998 semester, King and Shupp began socializing outside school on a regular basis. King considered Shupp a close friend and a mentor. (Docket Entry No. 27, Ex. A-1, p.1)

King states that in the summer of 1998, Shupp kissed her for the first time, at King's house. *(Id.* at p.1-2). A similar incident occurred later that summer when Shupp accompanied King to a volleyball tournament in Dallas. This trip was not a CISD-sponsored event. King also played volleyball with a private organization, Club Texas Volleyball, which is not affiliated with CISD. Shupp stayed with relatives during the tournament, but spent one night in a hotel room with King, sleeping in the same bed. (Docket Entry No. 27, Ex. A-1, p.2).

In the fall of 1998, King was a ninth-grade student at McCullough Junior High. She was selected to play on the varsity team at The Woodlands High School,

which was on a different campus. Shupp was not a varsity coach and did not directly coach King during the 1998-1999 year. During King's ninth- and tenth-grade years, however, Shupp continued to supervise King in connection with volleyball activities because the eighth-grade and ninth-grade "B" teams Shupp coached would travel with King's team and Shupp also served as an assistant coach during the varsity games. (Docket Entry No. 32, Ex. A, p.2).

King alleges that in September 1998, Shupp touched her for the first time in her "private area" while they were watching a movie at King's house. (Docket Entry No. 27, Ex. A-1, p.2). King claims that Shupp kissed her in the locker room of McCullough Junior High some time in the fall of 1998. (Docket Entry No. 32, Ex. A, p.3). By January of 1999, Shupp was penetrating King with her fingers in encounters that occurred away from school property and were unrelated to school events. In January of 1999, Shupp accompanied King to an out-of-town volleyball tournament and stayed in King's hotel room. This trip was made in connection with Club Texas Volleyball, not CISD. (Docket Entry No. 27, Ex. A-2). On this trip, King and Shupp engaged in sexual acts for several hours. (Docket Entry No. 27, Ex. A-1, p.2). From the spring of 1999 to August of 2001, the sexual encounters occurred on almost a daily basis and at various places, including movie theaters; at King's house; various parking lots; three different public parks; and hotel rooms. The encounters did not take place at the McCullough school campus.

During King's ninth-grade year, two McCullough students, Courtney Clark and Megan McDonald, found

a note that Shupp had written to King about their relationship. Clark confronted Shupp about her relationship with King. Shupp allegedly told the girl that she had made a mistake and that she had no relationship with King. (Docket Entry No. 32, Ex. H-6). The students did not report the incident to another teacher or coach or to Stockton. Shupp assured a worried King that no one would believe that they were involved in a relationship because Shupp was married and had a child. (Docket Entry No. 27, Ex. A-1, p.6).

In the fall of 1998, Ruth Stayton, a parent of a different McCullough student, told Stockton that she had heard from her son and his friend that a female coach and a female student were having an "affair." Stayton reported that her son's friend had stated that she had seen notes passed between the coach and student and had seen them kissing. In his discussion with Stayton, Stockton stated that he was unaware of any such inappropriate relationship, but would speak with Shupp. Stockton told Stayton that he did not think the report was true, because he knew the family. Shupp's mother was a teacher in the school district. Stockton stated in his affidavit that he does not specifically recall this conversation with Stayton. (Docket Entry No. 27, Ex C). The record contains three descriptions from Stayton of this conversation with Stockton. (Docket Entry No. 27, Ex. A-3; Docket Entry No. 32, Ex. B; Docket Entry No. 36, Ex. A).

It is undisputed that Stockton summoned Shupp to a meeting during the 1998-1999 school year. Shupp stated in her affidavit that she met with Stockton and Gale Drummond, the assistant principal. Stockton and Drummond asked Shupp if she was having an

inappropriate relationship with a student. Shupp replied that she was not. Shupp was also asked if she had touched a student in any way that could be perceived as inappropriate. Shupp replied that she had not. Shupp also stated that Stockton and Drummond warned her to keep her relationships with students professional at all times. (Docket Entry No. 27, Ex. B). Stockton did not recall the 1998 meeting or speaking to Shupp about any allegations involving Shupp and a specific student. (Docket Entry No. 27, Ex C).

William Shupp, who was then married to Felicia Shupp, described in his affidavit the conversation he had with Shupp about her conversation with Stockton and Drummond in the 1998 meeting. According to William Shupp's affidavit, Felicia Shupp stated that Stockton had specifically identified King as the student rumored to be involved with Shupp. William Shupp stated in his affidavit that Felicia Shupp told him that Stockton told her that Stockton had heard that King and Shupp "had been seen kissing, being together, hanging out together, and spending a lot of time together." (Docket Entry No. 32, Ex. C, p.1). According to William Shupp, Felicia Shupp said that Stockton said that he did not believe the rumors. *(Id.)* Stockton has made a hearsay objection to William Shupp's recounting of his conversation with Felicia Shupp, recounting what others told her. (Docket Entry No. 35).

During the 1999-2000 school year, King was in the tenth grade at The Woodlands High School and continued to play on the varsity volleyball team. Shupp continued to coach at McCullough Junior High School. Stockton had left his position at McCullough

Junior High, and was principal of The Woodlands High School. Shupp traveled with the varsity team and acted as an assistant coach for the varsity team during King's tenth-grade year. (Docket Entry No. 32, Ex. A, p.2).

In the spring of 2000, Shupp applied for the position of girls' junior varsity volleyball coach at The Woodlands High School. Teresa Hinajosa, the girls' varsity coach at The Woodlands High School, recommended Shupp for the position. Hinajosa relayed her recommendation to Weldon Willig, an athletic director at The Woodlands High School. According to Hinajosa, Willig initially supported Shupp's application. Willig arranged for Shupp to interview with him and Karen Heintz, another athletic director at the school. Shupp was not hired for the coaching position. (Docket Entry No. 32, Ex. D). King alleges that during the same period, Stockton spoke with Shupp about rumors of inappropriate behavior and told Shupp "that she needed to be careful in order to not jeopardize her job." (Docket Entry No. 32, Ex. A, p.4). William Shupp stated in his affidavit that Felicia Shupp told him that Willig and Heintz told her that they did not think it was a good idea for her to be on the same campus as King. (Docket Entry No. 32, Ex. C, p.2). Stockton has made a hearsay objection to the portions of the affidavits that recount conversations with Shupp about conversations she had with others during the time of her 2000 job application. (Docket Entry No. 35).

Shupp later applied for a position as an English teacher at The Woodlands High School. She was not hired. Stockton allegedly told her that the school no

longer needed an English teacher. After the 1999-2000 year, Shupp left her job at McCullough Junior High to teach seventh-grade English at Branch Crossing Middle School.

Shupp and King continued their sexual relationship until December of 2001. King reported Shupp's behavior in January 2002. Shupp pleaded guilty to an indictment charging sexual assault of a child. She was sentenced to seven years deferred adjudication and 45 days in county jail and required to register as a sex offender. (Docket Entry No. 32, Ex.I)

King filed this lawsuit in April 2003 against the Conroe Independent School District, and Stockton, and Shupp. In her first amended complaint, King asserted causes of action against Stockton under 42 U.S.C. § 1983 and asserted state law negligence and gross negligence claims. (Docket Entry No. 9). King based her section 1983 claim on Stockton's failure to protect her right to bodily integrity. Stockton moved to dismiss the state law negligence claims on the basis of the professional immunity provided to teachers and principals under section 22.051 of the Texas Education Code. (Docket Entry No. 16). This court granted Stockton's motion to dismiss the state law claims. (Docket Entry No. 22). Stockton now moves for summary judgment that he has qualified immunity against liability to King under section 1983 for failing to prevent or stop Shupp's sexual relationship with King. (Docket Entry No. 27)[1]. Stockton argues that, as

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[1] Stockton originally filed his motion for summary judgment on January 20, 2004 (Docket Entry No. 27). Stockton filed a motion

a matter of law, taking the facts in the most favorable light to King, he did not have the necessary knowledge of the sexual relationship and was not deliberately indifferent to King's constitutional rights. King has responded and submitted several affidavits in support of her opposition. (Docket Entry No. 32). Stockton objects to some of the evidence submitted in King's response and maintains that she has not presented facts sufficient to overcome qualified immunity. (Docket Entry Nos. 35, 36).

Each argument, and response, is examined below.

II. The Applicable Legal Standards

A. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56. Under FED. R. CIV. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Stahl v. Novartis Pharmaceuticals Corp.*, 283 F.3d 254, 263 (5th Cir. 2002). If the burden of proof at trial lies

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to stay this court's ruling until April 30, 2004 to allow Stockton to depose Ruth Stayton and a motion to leave to supplement the summary judgment record with Stayton's deposition. (Docket Entry No. 33). The motion to stay is moot. The motion to supplement the record is granted.

with the nonmoving party, the movant may either (1) submit evidentiary documents that negate the existence of some material element of the opponent's claim or defense, or (2) if the crucial issue is one on which the opponent will bear the ultimate burden of proof at trial, demonstrate the evidence in the record insufficiently supports an essential element or claim. *Celotex*, 477 U.S. at 330. The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1074 (5th Cir. 1997). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Baton Rouge Oil & Chemical Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 375 (5th Cir. 2002).

When the moving party has met its Rule 56(c) burden, the nonmoving cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *See Prejean v. Foster*, 227 F.3d 504, 508 (5th Cir. 2000). The nonmoving must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See id.* The nonmoving must "do more than simply show that there is some metaphysical doubt as to the material facts." *Webb v. Cardiothoracic Surgery Assocs.*, 139 F.3d 532, 536 (5th Cir. 1998) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The mere existence of a scintilla of evidence in support of the King's position will be insufficient; there must be evidence on which the jury could reasonably find for the King." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986).

"The admissibility of summary judgment evidence is subject to the same rules of admissibility applicable to a trial." *Resolution Trust Corp. v. Starker*, 41 F.3d 1018, 1024 (5th Cir. 1995). Affidavits supporting or opposing summary judgment must "set forth facts that would be admissible in evidence." FED. R. CIV. P. 56(e). *See Love v. Nat'l Med. Ctr.*, 230 F.3d 765, 776 (5th Cir. 2000) ("[The party opposing summary judgment must be able to prove the underlying facts."). Statements constituting hearsay are not competent summary judgment evidence. *Okoye v. Univ. of Tex. Houston Health Science Ctr.*, 245 F.3d 507, 510 (5th Cir. 2001) (citing *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995)). Material that is inadmissible will not be considered on motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial *Duplantis v. Shell Offshore, Inc.*, 948 F.2d 187, 192 (5th Cir. 1991).

In deciding a summary judgment motion, the court reviews the facts drawing all reasonable inferences in the light most favorable to the nonmoving party. *Cabillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721, 725 (5th Cir. 2002); *Anderson*, 477 U.S. at 255. "Rule 56 'mandates the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quoting *Celotex*, 477 U.S. at 322).

B. Qualified Immunity

In *Harlow v. Fitzgerald*, the Supreme Court stated that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense. *See Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir. 2001). Because qualified immunity constitutes an "*immunity from suit* rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis in original), the defense is intended to give government officials a right not merely to avoid standing trial, but also to avoid the burdens of "such pretrial matters as discovery . . . as '[i]nquiries of this kind can be peculiarly disruptive of effective government.'" *Id.* (quoting *Harlow*, 457 U.S. at 817, 102 S.Ct. 2727) (alterations in original). Adjudication of qualified immunity claims should occur "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). "The legally relevant factors bearing upon the *Harlow* question will be different on summary judgment than on an earlier motion to dismiss." *Behrens v. Pelletier*, 516 U.S. 299, 309, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). At the earlier stage, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized." *Id.* "On summary judgment, however, the plaintiff can no longer rest on the pleadings . . . and the court looks to the evidence before it (in the light

most favorable to the plaintiff) when conducting the *Harlow* inquiry." *Id.*

In order to state a claim under section 1983, a plaintiff must allege two elements: (1) that the plaintiff was deprived of a right or interest secured by the Constitution and laws of the United States; and (2) that the deprivation occurred under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2255, 101 L.Ed. 2d 40 (1998). Claims against individual public officials under section 1983 are subject to the defense of qualified immunity. *Foley v. Univ. of Houston Syst.*, 355 F.3d 333, 338 (5th Cir. 2003). Courts evaluating section 1983 claims based on allegedly unconstitutional conduct by state actors ask two questions to determine whether the state actors are entitled to qualified immunity. *Siegert v. Gilley*, 500 U.S. 226, 232-34, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). "[The first inquiry must be whether a constitutional right would have been violated on the facts alleged." *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "[If a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id.* at 201, 121 S.Ct. 2151. In assessing whether the facts alleged demonstrate a constitutional violation, the court analyzes the law using "the currently applicable . . . standards." *Felton v. Polles*, 315 F.3d 470,477 (5th Cir. 2002) (quoting *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998) (internal quotations omitted)).

Supervisory officials cannot be held vicariously liable for the actions of their subordinates under section 1983. *Oliver v. Scott*, 276 F.3d 736, 742 (5th

Cir. 2002). "Only the direct acts or omissions of government officials, not the acts of subordinates, will give rise to individual liability under [section] 1983 ." *Id.* (quoting *Alton v. Tex. A & M Univ.*, 168 F.3d 196, 200 (5th Cir. 1999)). "[S]chool officials can be held liable for supervisory failures that result in the molestation of a schoolchild if those failures manifest a deliberate indifference to the constitutional rights of that child." *Doe v. Taylor*, 15 F.3d 443, 445 (5th Cir.) (en banc), *cert. denied sub. nom*, *Lankford v. Doe*, 513 U.S. 815, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994). The Fifth Circuit has held that a supervisory school official may be held personally liable in an action under section 1983 for an employee's sexual abuse of a student if the plaintiff establishes that:

> (1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
>
> (2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
>
> (3) such failure caused a constitutional injury to the student.

Id. at 454. If this standard is not met, qualified immunity applies. *See Hagan v. Houston I.S.D.*, 51 F.3d 48 (5th Cir. 1995) (granting summary judgment on the basis of qualified immunity because principal's

response to complaint and rumors did not rise to level of deliberate indifference).

III. The Challenges to the Summary Judgment Evidence

In her opposition to Stockton's motion for summary judgment, King submitted her own affidavit and that of William Shupp, Felicia Shupp's former husband. Stockton challenges as hearsay the portions of the affidavits that contain Shupp's statements to King or Shupp about conversations Shupp had with Stockton and two other CISD employees during the 1988 meeting among Stockton, Drummond, and Shupp and when Shupp interviewed at The Woodlands High School in 2000. King did not reply to the hearsay objection.

When affidavits are used to support or oppose a summary judgment motion, they must "set forth such facts as would be admissible in evidence." *Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531,545 n. 13 (5th Cir. 2002); *Cormier v. Pennzoil*, 969 F.2d 1559, 1561 (5th Cir. 1992) (citing FED. R. CIV. P. 56(e)). Hearsay statements in an affidavit are not competent summary judgment evidence. *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995); *Cormier*, 969 F.2d at 1561 (citing *Martin v. John W. Stone Oil Distributor, Inc.*, 819 F.2d 547, 549 (5th Cir. 1987)). Although a nonmoving party need not produce evidence "in a form that would be admissible at trial," *Celotex Corp.*, 106 S. Ct. at 2553, the content or substance of the evidence must be admissible. "[Hlearsay testimony that would be inadmissible at trial may not be included in an affidavit to defeat summary judgment because '[a]

third party's description of [a witness'] supposed testimony is not suitable grist for the summary judgment mill.'" *Thomas v. IBM*, 48 F.3d 478, 485 (10th Cir. 1995) (quoting *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990).

1. Shupp' s Alleged Statements About the 1998 Meeting.

William Shupp's affidavit describing Felicia Shupp's account of her 1998 meeting with Stockton appears to be the only summary judgment evidence that Stockton specifically identified King as the student rumored to be involved in an improper relationship with Shupp. King's account of Shupp's account of the meeting does not include this fact. King states:

> In the Fall of 1998, Felicia told me that she had been pulled in to an administrator's office to talk with Gail Drummond and Don Stockton, and that they told her that they had heard a rumor that she had been seen kissing a *student*. Felicia told me I think they (Drummond and Stockton) believed me, but we need to be careful. Someone saw us kissing.

(Docket Entry No. 32, Ex. A, p.4) (emphasis added). King's affidavit repeats other evidence that Shupp was informed about a rumor involving an unidentified student.

In her affidavit, Felicia Shupp stated:

> I recall Mr. Stockton calling me down to his office at McCullough Junior High during the 1998-1999 school year for a meeting with him and Assistant Principal Gale Drummond. During the meeting, they asked me if I was having an inappropriate relationship with *any student*, and I told them that I was not. They also asked me whether I had touched *any student* in a way that could be misconstrued as inappropriate and I told them I had not.

(Docket Entry No. 27, Ex. B) (emphasis added).

William Shupp stated in his affidavit that in the fall of 1998:

> [Shupp] told me that she had been called in to talk to Don Stockton, and that he had given her a warning that he had heard 'all these rumors' about her and Haley King, and that she had better be careful. Felicia told me that when she asked Mr. Stockton what the rumors were that he had heard, he replied that he had heard that Felicia and [King] had been seen kissing, being together, hanging out together and spending a lot of time together. Mr. Stockton also told her "I don't believe it, but watch it."

(Docket Entry No. 32, Ex. C, p.1).

Stockton argues that William Shupp's affidavit presents multiple levels of hearsay: William Shupp relates what Felicia Shupp told him, about what

Stockton told her that some unidentified sources had told him. Each level of hearsay must qualify under an exception to, or an exclusion from, the hearsay rule to allow the statement's admission. FED. R. EVID. 805. Stockton's statement to Shupp is not hearsay, either because it is not offered for the truth of the statement but rather to show that the statement was made, as evidence of Stockton's knowledge, or because it is an admission by party opponent. FED. R. EVID. 801(c); FED. R. EVID 801(d)(2)(D). What Felicia Shupp told William Shupp, however, is offered for its truth and is not a party admission with respect to Stockton. FED. R. EVID. 801(d)(2)(A); *see Becerra v. Asher*, 921 F.Supp 1538, 1544 (S.D. Tex. 1996) ("It is only when the admission is offered against the party who made it that it comes within the exception to the hearsay rule for admissions of a party opponent.").

The fact that one level qualifies as "nonhearsay" does not excuse the other level from satisfying an exception or falling within an exclusion to the hearsay rule. *U.S. v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987) ("For the purposes of the hearsay-within-hearsay principle expressed in Rule 805, 'non-hearsay' statements under rule 801(d) . . . should be considered in analyzing a multiple-hearsay statement as the equivalent of a level of the combined statements 'that conforms with an exception to the hearsay rule.'"); Capra, *et al.*, 4 FEDERAL RULES OF EVIDENCE MANUAL § 805.02 (8th ed. 2002) ("[Rlule 805 could technically be read to be inapplicable to situations in which [nonhearsay] statements are included within another statement that is hearsay. But, Courts have held that the technical differences between . . .'not hearsay' and . . . 'hearsay subject to exception' cannot control the

application of Rule 805's limitation on multiple hearsay.").

Felicia Shupp's statements to William Shupp are hearsay because King offers them to prove the truth of the matter asserted – that is, that Stockton made certain statements to Felicia Shupp. FED. R. EVID. 801(c). King has offered no basis for the admissibility of the statements in William Shupp's affidavit about the 1998 meeting. Rule 801(d)(2)(D) does not provide such a basis. Although this rule provides that "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is not hearsay, "[i]t is well established that 'Rule 801(d)(2)(D) requires the proffering party to lay a foundation to show that an otherwise excludable statement relates to a matter within the scope of the agent's employment.'" *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1566 (11th Cir. 1991) (citing *Breneman* v. *Kennecott Corp.*, 799 F.2d 470, 473 (9th Cir. 1986)). Shupp's statements to her husband about what Shupp's supervisor told her are not within Rule 801(d)(2)(D) because reporting such a personnel matter to her spouse is not within the scope of Shupp's agency. *See Staheli v. University of Mississippi*, 854 F.2d 121, 127 (5th Cir. 1998) (excluding statement of professor to colleague regarding the university's personnel decision).

2. *Shupp 's Alleged Statements about the 2000 Interviews.*

In their affidavits, William Shupp and King also describe statements made to them by Felicia Shupp

about conversations she had with Stockton and other CISD employees when she applied in 2000 for a coaching position and a teaching position at The Woodlands High School. According to William Shupp:

> Felicia did not get the coaching job at the Woodlands High School. I remember her coming home from a meeting with Karen Heinze [sic] and Weldon Willig, and being very upset about it. When I asked her what was wrong, she told me "It's come up again," referring to the rumors about her relationship with [King], which she said was one of the main reasons that she did not get the coaching position at the school. She told me that Heinze [sic] and Willig did not think it would be a good idea for her and [King] to be on the same campus.

(Docket Entry No. 32, Ex. C, p.2).

According to King:

> In the Spring of 2000, Felicia applied for the junior varsity volleyball coaching position at The Woodlands High School. Don Stockton, who had been the principal at McCullough during my 8th and 9th grade years was now at The Woodlands High School. . . . Don Stockton called Felicia in for a conference. He told her that rumors were continuing to circulate about our relationship and she needed to be careful in order not to jeopardize her job. . . Felicia did not get the coaching job at The Woodlands High School for the Fall of 2000. . . Felicia told me that she thought that she did not get the job

> because the rumors about our relationship were still circulating. Very quickly after she was turned down for the coaching job, she interviewed with Don Stockton for an English teaching job at The Woodlands High School. She was also turned down for that job, as well. Felicia told me that Stockton explained that the school no longer needed a new English teacher.

(Docket Entry No. 32, Ex. A, p.4).

The statement attributed to Heintz and Willig, that they did not think it would be a good idea for Shupp and King to be on the same campus, is not being offered for its truth, but rather as evidence that it was said. Stockton's statement is not hearsay, either because it is offered to show that it was made as evidence of his knowledge, or because it is a statement by a party opponent. FED. R. EVID. 801(c); FED. R. EVID. 801(d)(2)(D). But King is offering Felicia Shupp's statements to her and William Shupp about what Stockton, Heintz, and Willig said for their truth. Felicia Shupp has not provided an affidavit or given deposition testimony stating that Stockton, Heintz, and Willig made such statements. Shupp's out-of-court statements about the conversations are hearsay. Shupp was not acting within the scope of any agency relationship when she made her statements to William Shupp or to King. Indeed, in 2000, when Shupp made the statements, she was not working at the school where Stockton served as principal. Rule 801(d)(2)(D) requires that an agent's statement be made during the existence of the employment relationship. FED. R. EVID. 801(d)(2)(D); *see Walkerton v. Columbus Separate School Dist.*, 985 F.2d 815, 818 (5th Cir.

(admitting double hearsay testimony against school district defendant when both declarants were agents of the school district but excluding the relayed statement against the individual defendants); *Blanchard v. Peoples Bank*, 844 F.2d 264, 267 (5th Cir. 1988) (statement by former bank employee was inadmissible against the bank because employee was not working at the bank when the statement was made).

The statements in the affidavits of King and William Shupp about statements made to them by Felicia Shupp about what was said to her in the 1998 and 2000 meetings are not competent summary judgment evidence. This court does not consider these portions of the affidavits in the summary judgment analysis.

IV.The Qualified Immunity Analysis

A. Under Color of State Law

Stockton argues that King did not allege or present summary judgment evidence showing that the sexual relationship she alleges occurred while Shupp was acting in her capacity as a CISD employee. Stockton emphasizes the undisputed evidence in the record that the relationship between Shupp and King developed outside the school environment and that all but one of the sexual encounters occurred outside school property and apart from school activities.

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken

'under state law.'" *Townsend v. Mayo*, 291 F.3d 859, 861 (5th Cir. 2002) (quoting *U.S. v. Causey*, 185 F.3d 407, 415 (5th Cir. 1999)). A defendant acts under color of state law if he misuses or abuses his official power and if there is a nexus between the victim, the improper conduct, and the defendant's performance of official duties. *Id.* If a state officer "pursues personal objectives without using or misusing the power granted to him by the state to achieve the personal aim, then he is not acting under color of state law." *Id.* (quoting *Harris v. Rhoses*, 94 F.3d 196, 197 (5th Cir. 1996)). In the context of sexual abuse by public school teachers, a "real nexus" must exist between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher. *Doe v. Taylor*, 15 F.3d at 452 n. 4.

The state actor need not be the actual perpetrator. "Given a real nexus, school supervisors who are deliberately indifferent to a student's constitutional liberty interest in her bodily integrity are themselves the state actors who perpetrated the constitutional tort, regardless of whether the individual who actually made illicit physical contact with the student was acting under color of state law." *Becerra v. Asher*, 105 F. 3 d 1042, 1048 (5th Cir. 1997), *cert. denied*, 522 U.S. 824 (1997); *see Doe v. Rains County I.S.D.*, 66 F.3d 1402, 1414 (5th Cir. 1995) ("[T]he existence of a legal right of control is the linchpin in all cases in which we have found [section] 1983 liability based on breach of a duty of act, even where private actors committed the injurious harm.")

The record shows that virtually all of the sexual encounters occurred away from school property – at

King's home; at Shupp's home; in parking lots; parks; in movie theaters; and hotels. The record shows that many of the sexual encounters occurred apart from any school-related activities. There is a factual dispute as to whether sexual contact between Shupp and King occurred on CISD property or at CISD-sponsored events. According to Shupp:

> The only time that I supervised Haley King in any way as a CISD employee was as a coach at McCullough Junior High during the 1997-1998 school year. At no time during that year did I engage in any physical and or sexual relationship with Haley King. Further, at no time did I ever engage in any physical or sexual contact with Haley King on CISD school property, during CISD school hours, or while attending a CISD sponsored or CISD related extra-curricular activity.

(Docket Entry No. 27, Ex. B, ¶ 7).

King quotes this paragraph from Shupp's affidavit to state her disagreement with its contents. King claims that Shupp kissed her in the McCullough Junior High locker room in the fall of 1998. (Docket Entry No. 32, Ex. A, p. 3). Shupp was not King's coach at the time, but Shupp's presence in the locker room was in her capacity as a CISD employee.

Stockton claims that the facts King has presented resemble the facts of *Becerra*, 105 F.3d 1042. In *Becerra*, a parent whose son was sexually abused by a teacher brought a section 1983 claim against the school district and its administrators on the grounds

that they had failed to prevent the abuse. *Id* at 1044-45. The court held that the teacher's sexual assault on the student did not occur under color of state law. *Id.* at 1047. The teacher and the student became friends at school, but the alleged abuse occurred more than five months after the student had withdrawn from the defendant's school and the assaults occurred at the student's home. *Id.* at 1047. The court rejected the parent's argument that state action could be based on the evidence that the seduction began at school and the later sexual abuse would not have occurred if the student's trust and affection had not been won while the seducer served as his teacher. *Id.* The court found the facts insufficient to establish the "real nexus" element described in *Doe*, emphasizing that the constitutional violation does not extend to "the development of trust and affection." *Id.*

In *Doe*, by contrast, the defendant was plaintiff's teacher "before, during, and after" the sexual abuse and the intimate conduct occurred "on and off" school grounds. *Doe v. Taylor*, 15 F.3d at 461-62 (Higginbotham, J., concurring). In *Doe*, the court found that the defendant teacher had used his state power to facilitate the sexual abuse. The teacher required the plaintiff to do little or no work and awarded the plaintiff high grades. *Id.* at 452, n.4. *Doe v. Taylor*, distinguished *D.T., M.T. v. I.S.D. of Pawnere County*, 894 F.2d 1176 (10th Cir. 1990). In *D.T.*, a teacher molested three students during summer vacation while engaged in a fund-raising drive for a basketball camp. The court found that the requisite state action was missing because at the time of the abuse, the

teacher was not representing the school and the activity was not school related. *Id.* at 1186.[2]

The evidence in this case, taken in the light most favorable to King, falls between *Becerra* and *Doe*, but is closer to *Doe*. King has not alleged or presented evidence of acts of sexual abuse occurring while Shupp was King's head coach. While King was playing on Shupp's team, the two became friends. As in *Becerra*, Shupp used her position as coach to secure the trust and confidence of both King and her parents, with the result that Shupp was able to spend time with King outside school and alone. Unlike *Becerra*, however, there is evidence in the record that at least one instance of physical contact took place at the school. *See Doe*, 15 F.3d at 452, n.4 ("Stroud was also Doe's basketball coach and he exploited that position as well. The first physical contact Stroud had with Doe was after a basketball game ... when he grabbed her and kissed her."). Unlike *Becerra*, and like *Doe*, the evidence in this record showed no temporal separation between the sexual encounters and the school-related contacts. Shupp supervised King in connection with volleyball activities throughout the physical relationship. In *Becerra*, no physical contact occurred while the plaintiff was a student of the teacher. Shupp's contacts with King were related to Shupp's status and work as a coach, both before and during the sexual relationship. King presented facts that, taken in the light most favorable to King, show that Shupp

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[2] King and Shupp's sexual encounters that occurred during out-of-town trips with the private volleyball club were not considered in the state action determination.

supervised King before and during the sexual encounters, which occurred both on and off school grounds.

B. The *Doe v. Taylor* Standard

Summary judgment on qualified immunity requires Stockton to show that there is no disputed fact issue material to determining whether he was responsible for King's injury. Under *Doe* v. *Taylor,* 15 F.3d 443, to hold a school official liable for a teacher's physical sexual abuse of a student, the student must show that the supervisor learned of facts or a pattern of inappropriate sexual behavior by the teacher that pointed plainly towards the conclusion that the teacher was sexually abusing the student; the supervisor demonstrated deliberate indifference by failing to take action that was obviously necessary to prevent or stop the abuse; and that failure caused the constitutional injury. *Id.* at 454.

1. *Stockton's Knowledge of Facts or a Pattern of Inappropriate Sexual Behavior by Shupp Pointing Plainly to the Conclusion that Shupp was Sexually Abusing King.*

King identifies three incidents to support the first prong of *Doe.* First, King cites to a statement made by Jane Allen, a teacher at McCullough, whose classroom was close to Shupp's.[3] Allen became concerned because students were gathering around Shupp's classroom door while Shupp was on hall duty. Allen advised

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[3] The record does not provide a date for the Allen conversation.

Shupp not to visit with students while she was on hall duty because that was an academic responsibility requiring a teacher's full attention. (Docket Entry No. 32, Ex. H-2). Stockton was aware of Allen's advice to Shupp, but Allen did not express any concern about a particular student or about an inappropriate relationship with any student. (Docket Entry No. 32, Ex. F, p.99, 113 lns. 22-25). Allen's statement to Shupp does not point to a conclusion of sexual abuse.

King also relies on the summary judgment evidence of Ruth Stayton's conversation with Stockton in the 1998-1999 school year. In that conversation, Stayton told Stockton that she had heard her son and another McCullough student discussing an "affair" between a female volleyball coach and a female student and that the coach and the student had been seen kissing and passing notes. The record contains three versions of Stayton's conversation with Stockton.

In February 2002, Ruth Stayton gave the following written statement to the Montgomery County Sheriff's Department:

> In the Winter/Spring of 1999 I became privy to some information about a student at McCullough and a P.E. coach. I overheard or heard from my son who attended McCullough at the time that a female coach and a student (female) were having "an affair." That my son's friend had seen the notes passed between them and had seen them kissing. I was very disturbed about this and went up to [McCullough] one morning just as school was starting and spoke to Dr. Don Stockton about it. I found him in the

> lunch room and told him just what I have stated here. I did not know which teacher or which student. But I knew that it was a female coach of the volleyball team. I thought the name of the coach was Shupp. Dr. Stockton said that he was unaware of this but he would bring her into the office and would talk to her. He didn't seem to think it was true and said that he knew her family. That is the only knowledge or information I have on this matter.

(Docket Entry No 27, Ex. A-3).

Since that time, Stayton has provided an affidavit and deposition testimony. Stayton's affidavit states:

> In or about the Fall of 1998 through January 1999, while at my home in the Woodlands, I overheard or heard a conversation between my son and a friend of his about a female student at McCullough and a female girls' coach. At the time, my son was also a student at McCullough. The conversation that I heard was that a female coach and a student, also a female, were having an affair. My son's friend, who he was dating at the time, indicated to my son that she knew the student was a girl on one of the girls' volleyball teams and that she had seen the coach, (one of the girls' volleyball coaches), and the team member passing notes and kissing.
>
> I was very disturbed by what I heard. A few days later, I went to McCullough, just as school was starting, to speak with Dr. Don Stockton about what I heard. I first went to the school

> office and asked to speak with Dr. Stockton. The office personnel indicated that he could be found in the lunchroom. I proceeded to the lunchroom, where I found him and told him what I heard. At the time, I did not know the name of the teacher or the student, but I told him that it was a female coach for one of the girls' volleyball teams. He remarked, Coach Shupp. I could not confirm the statement. Stockton said that he was unaware of this information, but that he would bring her (Shupp) into the office and would talk to her. He further told me that he did not think it was true and said the he knew the family.
>
> Dr. Stockton made no further inquiry with me nor did he speak to my son or his friend, to my knowledge. When I made my statement he looked shocked, but knew the coach to which I was referring, as he mentioned her by name to me, Shupp. Our conversation lasted about 3 minutes.

(Docket Entry No. 32, Ex. B)

Stayton's deposition included the following testimony:

- Stayton did not introduce herself to Stockton or even give him her name when they spoke, because she did not want to "incriminate anyone who doesn't wish to come forward with their own information." (Docket Entry No. 36, Ex. A, p. 110). Stayton knew who Stockton was

because she had worked at McCullough Junior High. (*Id.* at 118).

- Stayton did not tell Stockton that she had personal knowledge of an affair, kissing, or note passing. (*Id.* at 110).

- Stayton did not provide Stockton with the names of any students who did have personal knowledge of an affair, kissing, or note passing. Stayton did not know the identity of the student who had allegedly seen the kissing or the note passing. (*Id.* at pp. 65-66, 109-111).

- Stayton initially testified that she told Stockton that did not know the name of the student or the coach, but later testified that she thought her son and his friends mentioned the name "Shupp," because "when Dr. Stockton said 'Coach Shupp' that sounded familiar to me." (*Id.* at 81-83).

No version of Stayton's testimony suggests that she mentioned King's name in her conversation with Stockton. The record is unclear as to whether Stayton specifically mentioned Shupp's name. Taking the evidence in the light most favorable to King, Stayton did describe the coach as a female volleyball coach and Stockton identified Shupp by name in the conversation. Even taken in such a favorable light, Stayton's statement does not raise a fact issue as to whether Stockton knew of facts or a pattern of inappropriate sexual behavior pointing plainly to the conclusion that Shupp was sexually abusing a student.

A single report of a rumor of a sexual relationship, which does not identify the alleged victim, does not point plainly to a conclusion of sexual abuse. In similar cases, courts have held that comparable information does not give a principal the knowledge of an inappropriate sexual relationship necessary to overcome qualified immunity against a claim of failing to prevent a teacher from sexually abusing a student. *See, e.g., Doe v. Rains County I.S.D.*, 76 F.3d 666, 667 (5th Cir. 1996) (principal seeing plaintiff and coach together, his receipt of inconclusive response when he asked another coach about a possible relationship between the plaintiff and coach, and a report by a second student that the same coach had asked her out on a date, did not satisfy knowledge requirement); *Doe v. Beaumont I.S.D.*, 8 F.Supp.2d 596, 612 (E.D.Tex. 1998) (holding that a principal's receipt of a report by a student that the teacher hugged her and looked up her dress did not satisfy the first prong of *Doe v. Taylor*); *cf. Hagan v. Houston I.S.D.*, 51 F.3d 48, 51-53 (noting that after a student report of inappropriate touching, a student report of a sexual relationship, and a teacher's report of a sexual relationship with a third student, the principal had sufficient facts that pointed plainly toward the conclusion that the teacher was engaging in sexual activity with his students); *Doe v. Taylor*, 15 F.3d at 456-57 (listing principal's knowledge as including over six reports including complaints from parents, students, and numerous employee reports and noting the importance of the fact that the principal had received knowledge that the teacher was directing his inappropriate behavior specifically toward the plaintiff).

The summary judgment evidence shows that the only person who had heard a rumor about or suspected an inappropriate relationship between Shupp and King, specifically, was a student who found a note from Shupp to King. That student approached Shupp about the note – not Stockton. (Docket Entry No. 32, Ex. H-8). *See Doe v. Dallas I.S.D.*, 153 F.3d 211, 218 (5th Cir. 1998), *cert. denied,* 531 U.S. 1073,121 S.Ct. 766, 148 L.Ed.2d 667 (2001) (noting that students' reports of abuse to teachers, without evidence linking the information to the principal, did not show principal's knowledge of abuse).

The summary judgment record does not indicate that rumors of an inappropriate relationship between King and Shupp circulated among the faculty. Gail Drummond, the assistant principal at McCullough, and Jane Allen, a teacher at McCullough, both specifically told the Montgomery County investigators that they had not heard any rumors about Shupp and any student. (Docket Entry No. 32, Ex H-9, p.8). A single report to Stockton from a third party about a rumor does not raise a fact issue as to whether Stockton had sufficient knowledge to point plainly toward the conclusion that Shupp was sexually abusing a student.

The third area of summary judgment evidence on whch King relies involves Shupp's application in 2000 for positions at The Woodlands High School. During the 1999-2000 school year, Stockton was the principal at The Woodlands High School. King claims that Stockton's knowledge of Shupp's sexual abuse is evidenced by the fact that Shupp was not hired for two positions she sought at The Woodlands High School.

King claims that Stockton exercised a de facto veto over Shupp's application for junior varsity girls' volleyball coach and refused to hire Shupp as an English teacher.

As evidence of Stockton's involvement in the decision not to hire Shupp as a volleyball coach, King relies on a statement in Stockton's affidavit that a CISD principal is involved in every hire at his or her school.[4] (Docket Entry No. 32, Ex. F, 49-50). King also relies on the affidavit of Teresa Hinajosa, the girls' varsity volleyball coach at The Woodlands High School in 2000.[5] Teresa Hinajosa suggested Shupp as a candidate for the junior varsity coach position. Shupp then interviewed with Willig and Heintz, the athletic directors at The Woodlands High School. Hinajosa stated that Willig was initially enthusiastic about hiring Shupp. Hinajosa also claims that Shupp felt optimistic about her interview with Willig and Heintz. (Docket Entry No. 32, Ex. D, p.2). Hinajosa claims that

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[4] King relies on her own affidavit as evidence of Stockton's involvement in the decision not to hire Shupp as a volleyball coach. King stated that Shupp had told her that Don Stockton had called Shupp in for a conference in the spring of 2000, when Shupp applied for the coaching position at the high school, and warned her that rumors could threaten her job security. (Docket Entry No. 32, Ex.A p.4). This statement is inadmissible hearsay.

[5] King also submitted the affidavit of William Shupp, in which he stated that Shupp told him that Willig and Heintz told Shupp they did not think it would be a good idea for Shupp to work at the same campus where King attended school. (Docket Entry No. 32, Ex.C) This statement is inadmissible hearsay.

the initial enthusiasm Willig showed for hiring Shupp suddenly disappeared. The record reveals no explanation from Willig or Heintz as to their decision to forego hiring Schupp.[6] Hinajosa stated, "In reflecting on the matter now, given the allegations that have been made, I believe that when Don Stockton got involved with the interview process, something happened." *Id.*

King offers as the "most telling" evidence that Stockton told Heintz about Shupp's sexual abuse, Heintz's change in behavior toward King after the decision not to hire Shupp. According to Hinajosa, Heintz did not care for King before the decision not to hire Shupp was made. After the decision was made, Hinajosa saw Heintz talking to King. When Hinajosa asked about their conversation, Heintz replied that she felt sorry for King. *Id.* Heintz offered no explanation as to why she felt sorry for King.

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[6] The summary judgment evidence also shows that Heintz had problems with Shupp as a coach before Shupp applied for the position in 2000. King submitted various documents from Shupp's employment records. Among these records is a memo from Shupp, dated August 31, 1998. The memo detailed a list of "incidents" that had occurred between Heintz and Shupp. Shupp stated that she felt Heintz had behaved "very unprofessional" and that she did not understand Heintz's behavior toward her. Shupp stated: "It has come to a point where I feel that documentation is necessary for my benefit." (Docket Entry No. 32, Ex. H-10). This memo predates the hiring decision and Stockton's conversation with Stayton.

Heintz's changed behavior toward King does not a raise a fact issue as to Stockton's knowledge of sexual abuse. There is no competent summary judgment evidence that links the decision not to hire Shupp to coach or teach in the high school to Stockton's knowledge of an inappropriate relationship Shupp had with King in the middle school. *See Doe* v. *Dallas I.S.D.*, 153 F.3d at 218, n.7 ("Testimony based on conjecture or speculation is insufficient to raise on issue of fact to defeat a summary judgment motion ....") (quoting *Ruiz v. Whirlpool*, 12 F.3d 510, 513 (5th Cir. 1994); *Burns-Toole D.D.S. v. Byrne*, 11 F.3d 1270, 1275 (5th Cir. 1994) (on motion for summary judgment, "plaintiff could not prevail with mere conclusory statements evidencing only a personal belief that the defendants were motivated by an impermissible animus").

The three areas of summary judgment evidence do not a raise a fact issue as to whether Stockton had the necessary knowledge under *Doe v. Taylor*. The record reflects that Stockton knew that Allen had advised Shupp against talking to students during hall duty; that Stockton received one complaint in 1998 of a rumor about Shupp and an unidentified student; that when Stockton talked to Shupp, she directly denied any inappropriate relationship with a student; and that Stockton later decided not to hire Shupp at a different school. The evidence, taken as a whole and viewed in the light most favorable to King, does not raise a fact issue as to whether Stockton had learned

of facts that pointed plainly toward the conclusion that Shupp was sexually abusing King.[7]

2. Deliberate Indifference toward King's Constitutional Rights by Failing to Take Action that was Obviously Necessary to Prevent or Stop the Abuse.

"The deliberate indifference standard is a high one." *Doe* v. *Dallas I.S.D.,* 153 F.3d at 219. "Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference and thus do not divest the official of qualified immunity." *Id.* The court explained in *Doe v. Taylor*:

> Deliberate indifference will often be a fact-laden question. . . . We can foresee many good faith but ineffective responses that might satisfy a school official's obligation in these situations, *e.g.*, warning the state actor, notifying the

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[7] The affidavit of Joe Sclider, a sergeant in the Investigative Services Command, Detective Division of the Montgomery County Sheriff's Department, who conducted the investigation of Shupp after King reported their relationship, contained a statement that he believed Don Stockton knew about the relationship between Shupp and King. Sclider based this belief not on any specific information, but rather the investigation generally and his "experience in working in and around the Woodlands, which indicated to [him] that Stockton knew everything that went on in his school." (Docket Entry No. 32, Ex. H, p. 2). Such a conclusory and speculative statement is not probative of Stockton's specific knowledge of a relationship between Shupp and a student.

> student's parents, or removing the student from the teacher's class. Indeed, if [the principal] had sternly warned [the teacher] early on to stay away from Doe or risk termination and [the principal] then received no later indication of further misconduct, the standard of deliberate indifference would be difficult to establish.

Doe v. Taylor, 15 F.3d at 457 n. 12.

Stockton argues that the record does not raise a genuine issue of fact as to his deliberate indifference because it is undisputed that he met with Shupp and specifically warned her about inappropriate behavior with students. Shupp testified that she met with Stockton and Drummond, at Stockton's request. During the meeting, Shupp was asked if she was having an inappropriate relationship with any student. She replied that she was not. Shupp was also asked if Shupp had touched any student in any way that could be misconstrued as inappropriate. Shupp answered that she had not. Shupp stated that Stockton and Drummond told her to keep her relationship with students professional at all times. (Docket Entry No. 27, Ex. B, ¶ 9).

As evidence of Stockton's deliberate indifference, King argues that Stockton stated in his affidavit that his personal policy "is to not give credence to or investigate any unsubstantiated information regarding the sexual abuse of a child by a school employee." (Docket Entry No. 32, p.24). King is referring to the following portion of Stockton's deposition testimony:

> Q: Would–would any claims of–of a teacher/student relationship, with those be minor or major?
>
> A: It depends on if it was substantiated at all.
>
> Q: Okay. So–so you never categorize–you personally never categorize those types of things as minor or major; it was a matter of substantiation with you?
>
> A: Yes.

(Docket Entry No. 32, Ex. F, p.66 Ins. 19-25).

This exchange merely refers to how Stockton "categorized" issues. Stockton did not testify that he did not give credence to or investigate unsubstantiated claims. The relevant inquiry is what Stockton did after Stayton brought to his attention a potential problem with Shupp. Stockton did respond to Stayton's report, as evidenced by the undisputed evidence of the meeting among Stockton, Drummond, and Shupp.

King also asserts that Stockton did not follow CISD procedures.[8] In *Hagan v. Houston I.S.D.*, 51 F.3d at 53,

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[8] The CISD policy states:

> Information about sexual harassment or sexual abuse of a student that may reasonably be characterized as known or suspected child abuse or neglect shall be reported to appropriate authorities, as required by law. . . . Employees who have reason to believe that a student is

the court discussed a departure from school policy as evidence of deliberate indifference:

> The students placed a great deal of emphasis on the undisputed fact that [the principal] did not follow some of the procedures established in the HISD *Handbook for Principals,* which recommends steps a principal should take when a student reports a "sexual offense." However, the students have not persuaded us that all of the procedures listed in the *Handbook* were obviously necessary in light of both the complaints [the principal] had received and the result of his investigations. [The principal's] failure to precisely follow the *Handbook* does

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> being sexually harasses or sexually abused by a school employee shall report their suspicion to the principal, immediate supervisor, or Title IX coordinator. All allegations of sexual harassment or sexual abuse of students by employees shall be reported to parents and investigated.

(Docket Entry No. 32, Ex. E-1, p. 13). King also submitted a copy of an online version of CISD policy that quotes *Doe* v. *Taylor*:

> When an administrator learns of facts or a pattern of inappropriate sexual behavior by an employee under his or her supervision that plainly points toward the conclusion that the employee is sexually abusing a student, the administrator shall take appropriate action. *Doe v. Taylor, ISD*, 15 F.3d 443 (5th Cir. 1995).

(Docket Entry No. 32, Ex. E-2, p. 10).

> not itself establish that [he] was deliberately indifferent.

Id. at 53.

The court concluded that evidence that the principal did not follow the school district's recommended steps following a student's report of a sexual offense did not raise a fact issue as to deliberate indifference. In that case, the principal had information from students that a teacher had physically touched one student and had sexual relationships with another student and information from a teacher of a possible sexual relationship with a third student. *Id.* at 50-51. The principal interviewed the students who reported the abuse, the teacher, and other teachers who reported the rumors. *Id.* The teacher denied the accusations and the principal received some inconsistent information from the accusers. *Id.* The principal talked to the teacher and warned him that he could be fired for such behavior. *Id.* at 52. When another student sued, claiming that he was subsequently abused, the court found no deliberate indifference that failed to prevent the abuse. *Id.*

Departure from school policy cannot be considered without reference to the information received by the supervisory official. King has not submitted competent summary judgment evidence showing that Stockton received any report of misconduct involving Shupp after the Stayton discussion. It is undisputed that Stayton did not mention the name of the student with whom the coach was allegedly having the "affair." Stockton could not have contacted King's parents. In

light of the limited information Stockton was provided and his response – to meet with Shupp and warn her against inappropriate behavior with students – the record does not raise a fact issue as to whether Stockton acted with deliberate indifference.

The facts of this case do not approach those in cases in which school supervisors were denied qualified immunity for failing to prevent or stop sexual abuse by teachers. In *Doe*, the principal dismissed multiple parent and student complaints about the teacher's behavior as driven by jealousy. *Doe v. Taylor*, 15 F.3d at 446-47. The principal also ignored a librarian's report that she had witnessed the teacher involved in an incident of "child molestation." *Id.* at 447. When the teacher approached the principal about what the librarian had witnessed, the principal did not warn the teacher about his conduct, but rather agreed with the teacher that the librarian had overreacted. *Id.* The guidance counselor and an assistant principal also reported to the principal that they witnessed the teacher's inappropriate behavior with students. *Id.* When a student presented the principal with an inappropriate "love letter" written by the teacher to the plaintiff, the principal transferred the reporting student out of the teacher's class. *Id.* at 448. Rumors about the student and the teacher's sexual relationship were rampant among faculty and students; the principal himself openly acknowledged the rumor on one occasion. *Id.* The court denied the principal's summary judgment motion on the basis of qualified immunity.

In *Doe v. Taylor*, the court did grant summary judgment to the defendant superintendent. When the

superintendent received reports of sexual abuse, he responded by meeting with the alleged abuser and warning of the consequences of improper conduct and contacting the student's parents. *Id.* at 457-58. In one incident, the superintendent elected not to continue the investigation of a report after being dissauded by a parent. *Id.* The court concluded that as a matter of law, the superintendent's actions were ineffective but not deliberately indifferent. *Id.* The court granted summary judgment on the basis of qualified immunity.

Ths court concludes that, based on the summary judgment record, Stockton was not deliberately indifferent to King's constitutional rights and is entitled to qualified immunity.[9]

V. Conclusion

King has failed to plead or present sufficient summary judgment evidence raising a disputed fact issue material to determining whether Stockton learned of facts pointing plainly towards the conclusion that Shupp was sexually abusing King or demonstrated deliberate indifference by failing to take action that was obviously necessary in light of the information he received. Stockton's motion for summary judgment based on qualified immunity is granted.

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[9] This court need not separately analyze the equal protection claim because the analysis would be the same. *See Doe v. Taylor,* 15 F.3d at 458 (ruling that the substantive due process claim of a student under these facts superseded any possible equal protection claim, absent any arguments to the contrary).

SIGNED on September 8, 2004, at Houston, Texas.

/s/
Lee H. Rosenthal
United States District Judge

APPENDIX G

TITLE 20 - EDUCATION
CHAPTER 38 - DISCRIMINATION BASED ON SEX OR BLINDNESS

Sec. 1681. Sex

(a) Prohibition against discrimination; exceptions.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions in regard to admissions to educational institutions, this section shall not apply

(A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits

students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or

(B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations this section shall not apply to membership practices –

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences this section shall not apply to –

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for –

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance. Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total

number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined. For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 21 - CIVIL RIGHTS
SUBCHAPTER I - GENERALLY

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any

action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.